

APPROVED

[2023] IEHC 585



THE HIGH COURT

2023 No. 220 MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

BETWEEN

BRYAN JAMES BARKLEY DICKIE

APPELLANT

AND

INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 1 November 2023

INTRODUCTION

1. These proceedings take the form of an appeal to the High Court on a point of law pursuant to Section 24 of the Freedom of Information Act 2014. This judgment addresses the appropriate procedure to be adopted in circumstances where the respondent to the appeal, i.e. the Information Commissioner, has conceded a *single* ground of appeal. The respondent submits that the entire matter should be remitted for reconsideration by his office. The appellant,

NO REDACTION REQUIRED

conversely, wishes to pursue his appeal to the High Court on the remaining grounds of appeal.

PROCEDURAL HISTORY

2. This appeal relates to a request made to the Central Bank of Ireland for the disclosure of certain records pursuant to the Freedom of Information Act 2014 (“*FOI Act 2014*”). This request had been made by Mr. Dickie, the appellant herein, on 22 November 2022. The request related to the daily trading volume of three listed financial instruments or shares. The Central Bank of Ireland (“*CBF*”) refused the request. Following an unsuccessful application for an internal review, the appellant applied to the Information Commissioner to review the decision to refuse to grant the request.
3. (For ease of reference, the decision-maker is identified throughout this judgment as the Information Commissioner. In fact, the review function had been lawfully delegated to a senior investigator within the Commissioner’s office. Nothing turns on this delegation).
4. By review decision dated 10 May 2023, the Information Commissioner upheld the refusal of access to the records on two grounds. The first ground was that the disclosure of the records was prohibited under Section 42 of the FOI Act 2014. This section provides, in relevant part, that the Act does not apply to a record held by the Central Bank of Ireland the disclosure of which is prohibited by what are described as “*the Supervisory Directives*”. The shorthand the “*Section 42*” ground will be employed in this judgment to describe this ground for refusal.

5. The second ground for refusal relied upon by the Information Commissioner was that the records contain confidential personal information relating to the financial affairs of an individual and confidential financial information relating to a firm regulated by the Central Bank of Ireland. The records were said, therefore, to fall within the exclusion under Part 1(b)(i) of Schedule 1 of the FOI Act 2014. This provides as follows:

“Section 6 does not include a reference to—

the Central Bank of Ireland, insofar as it relates to—

- (i) records held by it containing—
 - (I) confidential personal information relating to the financial or business affairs of any individual, or
 - (II) confidential financial, commercial or regulatory information relating to the business affairs of any person who holds or has held or who has applied for a licence, authorisation, approval or registration from the Central Bank of Ireland, or is otherwise regulated by the Central Bank of Ireland,

that the Central Bank of Ireland has received for the purposes of performing, or in the discharge of, any of its statutory functions (other than when that information is contained in records in summary or aggregate form, such that persons cannot be identified from the record)”.

6. The shorthand the “*confidential financial information*” ground will be employed in this judgment to describe this second ground for refusal.
7. It should be explained that having found that the records were not subject to the FOI Act 2014, the Information Commissioner concluded that there was no need for him to address the *additional* grounds which had been relied upon by the Central Bank of Ireland in its decision. The CBI had relied upon Section 15(1)(a) and Section 17(4) of the FOI Act 2014 in addition to the two grounds subsequently upheld by the Information Commissioner.

8. The within proceedings were instituted by way of originating notice of motion on 14 July 2023. The proceedings take the form of an appeal on a point of law against the review decision of the Information Commissioner. The proceedings are brought pursuant to Section 24 of the FOI Act 2014.
9. The Information Commissioner has since indicated to the appellant and to the High Court that the review decision was premised, in part, on a factual error. More specifically, it has been explained that the investigator mistakenly thought that the financial instruments or shares were not regulated by the Central Bank of Ireland but rather by another European regulator. The investigator had concluded that, as such, the disclosure of the records would be prohibited by a “*Supervisory Directive*” within the meaning of the Central Bank Act 1942. On this analysis, the disclosure of the records would have been prohibited under Section 42 of the FOI Act 2014. It is now accepted on behalf of the Information Commissioner that this conclusion is erroneous and that the disclosure of the records is not prohibited under Section 42 of the FOI Act 2014.
10. Having regard to this concession, the Information Commissioner invites the High Court to set aside the review decision, and to remit the entire matter for reconsideration by his office. The appellant objects to this proposed course of action and indicates that he is anxious that the High Court should now determine all issues germane to the question of the disclosure of the records, including issues not directly addressed by the Information Commissioner in his review decision. The appellant invites the High Court to make an order directing the disclosure of the records.

DISCUSSION

11. It is in the public interest that statutory bodies, such as the Information Commissioner, should be prepared to concede legal proceedings at an early stage where appropriate. Such concessions result in a saving of time and costs for the parties. Such concessions can also have the benefit of ensuring that scarce judicial resources are not taken up unnecessarily.
12. In the present case, the concession is limited to an acknowledgment that one of the two grounds relied upon to uphold the decision to refuse the disclosure of the records was not well founded, i.e. the “*Section 42*” ground. The Information Commissioner does not concede that the records should be disclosed. Rather, the Information Commissioner makes the point that there are other potential grounds upon which disclosure might properly be refused. More specifically, the Central Bank of Ireland had relied on a number of *additional* grounds, over and above those addressed by the Information Commissioner in his review decision. It had been unnecessary for the Information Commissioner to consider these additional grounds in circumstances where he had thought—as it transpires mistakenly—that the review could be disposed of by reference to the threshold argument that disclosure was prohibited under Section 42.
13. The Information Commissioner submits that his office should now be given the opportunity to consider these other potential grounds for refusal. It is further submitted that it would be inappropriate for the High Court to determine these issues at first instance, without same having been determined by the Information Commissioner. Counsel on behalf of the Information Commissioner cites the judgment in *Molyneaux v. Financial Services and Pensions Ombudsman* [2021] IEHC 668 as authority for the proposition that the High Court, when

hearing a statutory appeal, should not determine issues which have not already been addressed by the designated decision-maker.

14. There would be much force in these submissions had the review decision in the present case been premised solely on the threshold argument that disclosure was prohibited under Section 42 of the FOI Act 2014. In such a scenario, the matter could usefully be remitted to the Information Commissioner with a direction that he reconsider the matter. This would allow the Information Commissioner to address the arguments made by the parties in relation to the potential exemptions under Section 15 and Section 17 of the FOI Act 2014. However, things are complicated by the fact that the Information Commissioner, in the impugned review decision, had relied upon a second ground for refusal, i.e. the “*confidential financial information*” ground, and makes no concession in respect of that ground. There must be a likelihood that this ground will be relied upon, again, in the context of any *fresh* decision made pursuant to the order for remittal.
15. It is correct to say, as counsel for the Information Commissioner does, that the effect of the High Court order will be to set aside the impugned review decision in its entirety and that the parties will have an opportunity to address further submissions to the Information Commissioner in respect of the “*confidential financial information*” ground.
16. It is, of course, possible that the Information Commissioner will change his mind on this issue and decide that the disclosure of the records is not precluded by reference to the “*confidential financial information*” ground. Importantly, however, it is equally possible that the Information Commissioner will continue to rely on the “*confidential financial information*” ground. Even allowing that the principle of *res judicata* may not apply with full force and effect in respect

of the Information Commissioner (cf. *Chubb Financial SE v. Financial Services and Pensions Ombudsman* [2023] IEHC 74), it is not unreasonable to expect that there would be consistency in decision-making.

17. Counsel for the Information Commissioner submits that if it were to transpire that the Information Commissioner did, indeed, continue to rely on the “*confidential financial information*” ground, it would be open to the appellant to bring a further appeal to the High Court. This submission is correct insofar as it goes. However, it is undesirable that there should be repeated appeals in respect of the same request for the disclosure of records. The appellant has exercised his right of appeal and, as part of that appeal, has advanced an argument that the Information Commissioner’s reliance on the “*confidential financial information*” ground is erroneous. The Information Commissioner, presumably with the benefit of advice from the legal team representing him in these proceedings, is not prepared to concede that reliance on this ground is erroneous. The Information Commissioner is, of course, entitled to take this stance. However, having regard to the stance taken by the Information Commissioner, and the likelihood that an order for remittal might, ultimately, result in the refusal of the disclosure of the records on similar grounds as before, it is in the interests of justice that the “*confidential financial information*” issue be determined now as part of the present appeal proceedings. The appellant is entitled to argue before the High Court that the Information Commissioner’s reliance on the “*confidential financial information*” ground is erroneous. The appellant contends that the disclosure of the daily trading volumes for a stock will not identify any of the participants, and thus does not entail a request for confidential

financial information. This issue is properly before the High Court and should be determined in these appeal proceedings.

18. It should be emphasised that the position would be different had the Information Commissioner conceded not only the “*Section 42*” ground but also the “*confidential financial information*” ground. In such a scenario, it would have been appropriate to set aside the impugned review decision and to remit the matter to the Information Commissioner. This would allow for those additional grounds, which had been advanced by the Central Bank, but not yet considered by the Information Commissioner, to be determined, i.e. the grounds referable to Section 15(1)(a) and Section 17(4) of the FOI Act 2014. The distinguishing feature of the present case is that the Information Commissioner is seeking to leave undisturbed one of his own findings, i.e. that in respect of the “*confidential financial information*” ground. This creates the risk that the impugned finding will simply be replicated in any fresh decision.

CONCLUSION AND FORM OF ORDER

19. For the reasons explained, the appellant is entitled to pursue his appeal in relation to the “*confidential financial information*” ground. This is because, notwithstanding the concession made in respect of the “*Section 42*” ground, there continues to be a live dispute between the parties as to whether the Information Commissioner erred in law in finding that the disclosure of the records is precluded by reference to the “*confidential financial information*” ground.
20. In the event that the appellant were to be successful on this ground of appeal, the matter is likely to be remitted to the Information Commissioner at that stage, to

allow his office address those *additional* grounds for refusal which have not yet been the subject of a determination by the Information Commissioner.

21. These appeal proceedings will be listed before me for case management at 10.45 AM on Monday 20 November 2023. In the interim, I direct that the Central Bank of Ireland be joined as a notice party to the proceedings.

Appearances

The appellant represented himself
Francis Kieran for the respondent instructed by the Office of the Information Commissioner

Approved
S. M. M. S.